No. 393

In the Supreme Court of the United States

OCTOBER TERM, 1944

GEORGE PAPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

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OPINION BELOW

The majority (R. 362–369) and dissenting (R. 369–370) opinions in the circuit court of appeals have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 7, 1944 (R. 371). The petition for a writ of certiorari was filed August 24, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The two questions upon which petitioner relies for the granting of certiorari (Pet. 17) are—

1. Did the trial judge err in permitting the jury to consider whether the transportation was not only for the purpose of prostitution but also "for any other immoral purpose"?

2. Did the trial judge err in holding that testimony by an attorney, called as a Government witness, that he was retained by petitioner to represent the woman transported after she had been arrested on a prostitution charge was not excludable as disclosing a privileged communication?

Two additional questions presented are—

3. Whether the testimony of an F. B. I. agent as to a statement made to him by petitioner should have been excluded as obtained in violation of the rule enunciated in *McNabb* v. *United States,* 318 U. S. 332.

4. Whether the trial court abused its discretion in refusing to call the woman transported as a court witness.

STATUTE INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

STATEMENT

On May 24, 1943, petitioner was indicted in the United States District Court for the Southern District of New York in one count charging that on or about July 11, 1942, he wilfully transported one Barbara Jorman from New York City to Washington, D. C., for the purpose of prostitution, debauchery, and other immoral purposes, in violation of Section 2 of the Mann Act (R. 5). After a jury trial petitioner was convicted (R. 339) and was sentenced to imprisonment for three years (R. 340). Upon appeal to the Circuit Court of Appeals for the Second Circuit the judgment was affirmed, one judge dissenting as to the two principal questions presented by the petition for a writ of certiorari.

The evidence for the Government may be briefly summarized as follows:

For a considerable period of time prior to the transportation in question Barbara Jorman was a prostitute in and about New York City (R. 36–39, 222–225, 231–233, 236–246), and at least on one occasion petitioner took her to a house of prostitution in another city where she worked for a short time as a prostitute, leaving there, with petitioner's knowledge, because business was bad (R. 231–246). There is testimony that for a short time in February, 1942, she lived with petitioner in a rooming house in New York City (R. 248–249), and immediately prior to the transportation in question and after her return from Washington to New York City, Barbara lived with petitioner in his penthouse apartment (R. 13, 15–17, 23, 53–55, 57–60, 254).

On July 1, 1942, Barbara was arrested in New York City for practicing prostitution, and on July 7, four days before the transportation charged in the indictment, she was convicted, but her three months' sentence was suspended (R. 36–40). One evening shortly thereafter, the exact date not being fixed in the record, petitioner had two handbags and a steamer trunk carried from his apartment to his Packard automobile (R. 46–47). He had also spoken to a representative of the apartment building in which he lived with reference to subletting his apartment for a couple of months, but this could not be accomplished (R. 11, 30). On the morning of July 11, 1942, petitioner and Barbara

arrived at a hotel in Washington, D. C., in a Packard automobile, and petitioner registered Barbara and himself at the hotel as Mr. and Mrs. George Pearson, of Union City, New Jersey, taking a room with a double bed and paying for occupancy by two. The luggage taken from the Packard to this room was described by a hotel employee as consisting of one large suitcase and two smaller ones. Later, on the same day, petitioner and Barbara were transferred to a better room of the same type. (R. 85–87, 103, 107.) Precisely how long petitioner remained at the hotel is not disclosed, but he was seen in and about the hotel several times within the next few days (R. 88, 95, 105, 106; cf. R. 95, 110). Petitioner was absent from his apartment in New York City at least two weeks (see R. 16–18).

On the morning of July 15 Barbara was arrested in the hotel room after she had invited a Sex Squad detective into the room and asked him for five dollars (R. 153–154).[1] Barbara was taken to the Women's Bureau and booked for investigation (R. 159, 284). That evening one Buckley, an attorney, appeared at the Bureau to see Barbara, and on the next evening she was "released to Attorney Buckley" by order of the detective who arrested her (R. 159, 160, 284), on the condition, the detective testified, that she leave

[1] Apparently at this time petitioner had left the hotel as no men's effects were found in the room by the policeman and the woman had but a single bag (R. 163–164).

Washington immediately (R. 160; see also R. 167).[2]

On the night of August 29, 1942, Barbara was again arrested, together with 14 other prostitutes, in another Washington hotel (R. 157), and on the next day she was released without prosecution to another attorney who represented her on that occasion (R. 284). On November 17, 1942, she was arrested in New York City and pleaded guilty to a charge of prostitution (R. 173–175).

After petitioner was taken into custody on April 26, 1943, by an F. B. I. agent, he admitted to the agent that he had registered at the hotel in Washington with Barbara as husband and wife and said "he didn't see that that made any difference, and if we were checking hotels on him we would have to do a lot of checking, for he

[2] While Buckley testified that Barbara was released at his instance, he denied that she was placed in his custody, or that her release was secured upon the condition that she leave town (R. 212, 215, 219, 287). Buckley's testimony also disclosed that he was retained by petitioner to represent Barbara and that petitioner paid his fee (R. 215). On this occasion, according to Buckley's testimony, petitioner came to see Buckley in a Packard automobile (R. 217). We have disregarded Buckley's testimony that petitioner retained him to represent Barbara, in discussing the question whether the evidence was sufficient to establish that petitioner transported Barbara not only for the purpose of prostitution but also for the purpose of continuing his illicit relationship with her (*infra*, pp. 10–12), in view of petitioner's contention that, since Buckley was retained by petitioner at the same time to represent him, this testimony should have been excluded as a privileged communication, a contention which, however, we think, is without merit (*infra*, pp. 12–15).

had registered in numerous places with various girls" (R. 254–267). He also stated that he had a Packard automobile which was stolen while he was in the vicinity of Washington in the summer of 1942 (R. 267).

Petitioner, after his arrest, was taken to the Federal House of Detention in New York City pending his release on bail, where he met an acquaintance who was also confined on a Mann Act charge. In the course of their conversation, petitioner told this acquaintance that he had lived with Barbara for two years, which, apparently the witness understood to mean, also, that "she was working for him"; that Barbara had made thirty to forty dollars a night; that petitioner and Barbara had driven to Washington from New York City because she had been arrested in New York for prostitution and had gotten a suspended sentence and was out on probation; that in Washington they checked in at a hotel as man and wife; that he checked her in there "for the purpose of prostitution"; that he stayed overnight at the hotel and then left; and that later, after Barbara's arrest at the second hotel in Washington, Barbara called petitioner and he drove her back to New York City (R. 177–178, 199–201).

Petitioner did not take the stand in his own defense.

ARGUMENT

1. One of the grounds upon which petitioner relies as a basis for certiorari (Pet. 17), is his con-

tention (Pet. 6–10) that the theory of the prosecution at his trial was that he transported Barbara in interstate commerce for the purpose of prostitution; that therefore the trial judge by his instructions (R. 322–323) improperly allowed the jury to convict petitioner if it found that he transported her for an immoral purpose other than prostitution; and that, in any event, the evidence was insufficient to support a conviction on the theory that she was transported for some immoral purpose other than prostitution.

In claiming that a new theory was injected into the case by the court's instructions, petitioner overlooks the fact that the indictment plainly alleged that the interstate transportation was "for the purpose of prostitution, debauchery and other immoral purposes" (R. 5), and that the Government's proof (see *infra*, pp. 3–7) was directed at showing that petitioner's purpose was to get Barbara away from the New York police so that, unmolested, she could continue her illicit relationship with him and at the same time practice her vocation as a prostitute. In any event, the prosecutor's theory of the case is not significant when, as in this case, the indictment alleges and the proof establishes that an inhibited criminal transportation has dual forbidden purposes. Cf. *United States* v. *Hutcheson*, 312 U. S. 219, 229; *Prussian* v. *United States*, 282 U. S. 675, 680–681. As the court below said (R. 365–366), "the proper issues in a criminal case are whether the indictment

fairly charges a crime as defined by a federal statute and whether the proof, adduced in a fair trial, supports the indictment, not what the prosecutor's legal theories of the case may have been."

This is not a case in which the prosecutor and the trial judge had to be nice in their selection of theories. The statute penalized the transportation if it was for any immoral purpose, including prostitution and debauchery. The function of the jury was to determine whether the transportation had been for some immoral purpose. The trial judge in his charge merely defined the two types of immoral purposes which could have application under the evidence presented—prostitution and illicit personal sex relationship—leaving it to the jury to determine whether the transportation was motivated by any such purpose (R. 322–325). Petitioner does not contend that the evidence fails to establish that the transportation was for the purpose of prostitution. Indeed, inferentially at least, he concedes that a sufficient case in that respect was made out for the jury, and the dissenting judge in the court below felt so keenly about the strength of the Government's evidence with reference to the prostitution angle of the transportation that he deemed it appropriate to say that, while he thought a reversal was required, "The evidence of the accused's guilt was so strong that I feel some compunction in voting to reverse * * *" (R. 369). Consequently, even if, as the dissenting

judge thought (R. 370), the evidence was "too doubtful" to justify a conviction on the basis that petitioner transported Barbara to Washington for the purpose of continuing his illicit relationship with her, it cannot be assumed, certainly, that the jury, as intelligent men, disregarded the convincing evidence that the continuation of her activity as a prostitute motivated her transportation by petitioner and, in disregard of their instructions, founded their verdict upon a purpose which rested, to use the language of the dissenting judge, in the "merest speculation" (R. 370). The jury's verdict was, of course, a general and not a special one; it must be upheld if there was evidence to support it, as plainly there was. This obviously is not a case submitted to the jury on two alternative *legal* theories, one of which is unsound.

Moreover, while it is true that, justifiably, the prostitution phase of the case was accorded the greater emphasis at the trial, we cannot agree with the dissenting judge that under the evidence there was "no reasonable ground for supposing that [petitioner] was led to bring [Barbara] on except to live on her earnings"; that it was "almost certain that he would have taken her though he knew he was merely to drop her at the hotel and return to New York" (R. 370). This appraisal of the evidence ignores too many significant factors to pass unquestioned. The evi-

dence summarized in the Statement (*supra*, pp. 3–7) indicates: Petitioner had been living with Barbara for two years. Immediately before their trip to Washington, petitioner occupied a penthouse apartment in New York City with Barbara as man and wife. During this time she was arrested by the New York police and received a three-months suspended sentence in connection with which she was placed on probation. Four days later, after an unsuccessful attempt to sublet the apartment for several months, petitioner and Barbara arrived in Washington, where they registered at a hotel as man and wife and were assigned to and paid for a room designed for occupancy by two, to which they had their fairly considerable luggage carried. While it appears that petitioner did not remain at this hotel more than a day or two, the jury, we think, was entitled to infer from the testimony, that petitioner did not leave Washington at that time but, instead, remained in that city until Barbara's second arrest on August 29, when, after she had "called" him about her trouble, he drove her back to New York, resuming his residence with her as man and wife at their apartment. There is no evidence that Barbara again engaged in prostitution until over two months after her return to New York City, which was over a month after, presumably, her probation expired, when she was again arrested by the New York police. Certainly the jury was entitled

fairly to infer from this evidence that beside the prostitution motive for the transportation, petitioner was equally interested in continuing his illicit relationship with Barbara, so far as the practice of her vocation permitted, when he brought her to Washington.

2. The second ground upon which petitioner relies for certiorari is that the trial judge violated the privilege against disclosure of communications between attorney and client when he permitted the witness Buckley, an attorney, to testify that petitioner retained him to represent Barbara when she was arrested in Washington on July 15, 1942, after Buckley had advised the judge that he was at the same time retained to represent petitioner. The facts with reference to this contention, briefly, are:

Buckley was called as a Government witness. In response to a question whether any man in the courtroom had been to his office on July 15, Buckley advised the court that a question of confidential communication between client and attorney was involved. The court then excused the jury (R. 170–171) and conducted a preliminary inquiry into the facts. Buckley advised the trial judge, merely, that he was retained on July 15 to represent Barbara and petitioner.[3] After affording counsel an opportunity to argue the legal questions and to examine the law on the subject (R. 171–

[3] It was pursuant to Buckley's efforts that Barbara was released from custody (*supra*, pp. 5–6).

172), the court ruled, in reliance upon *People ex rel. Vogelstein* v. *Warden of County Jail,* 270 N. Y. Supp. 362, affirmed, 271 N. Y. Supp. 1059 (1934), that Buckley "should be directed to answer the questions as to who retained him to appear for Barbara * * * in the City of Washington on or about July 11 [15], 1942, in connection with the charge of prostitution against her, and who paid his fee as an attorney for acting as an attorney for Barbara * * *" (R. 210). He also ruled that Buckley would be permitted to testify that when he saw petitioner he was driving a Packard automobile. Petitioner's counsel expressly stated that he had no objection to the latter ruling and Buckley testified as it was understood he would, without objection or exception. (R. 210–211, 217.) Counsel's objection and exception extended only to Buckley's testimony that petitioner retained him to represent Barbara on July 15 and that petitioner paid his fee (R. 211, 215–216). Buckley was not permitted to testify whether he was retained to represent anybody else on that occasion (R. 216).

While there is involved the application of a well-settled principle, there is apparently no case directly in point. According to the better authorities, an attorney, it would seem, may be asked whether, in representing a client he ~~has represented~~ was actually retained by someone other than such client, and this regardless of whatever damage may inhere in

such a disclosure. That question is regarded as purely preliminary to an invocation of the privilege. That which occasioned the retainer may not be inquired into. (See *People ex rel. Vogelstein* v. *Warden of County Jail, supra; United States* v. *Lee,* 107 Fed. 702 (C. C. E. D. N. Y.); but cf. *Ex Parte McDonough,* 170 Calif. 230 (1915).)[4] However, unlike in the instant case, it does not appear that in the *Vogelstein* and *Lee* cases the one who did the retaining was urging that revelation of the retainer resulted in the disclosure of something which occurred in the course of an attorney-client relationship.

The dissenting judge in this case was of the opinion that Buckley's testimony was inadmissible because petitioner's simultaneous retention of Buckley to represent Barbara as well as himself was a "step in his own defence" (R. 370). The weak spot in the dissenting judge's argument is, we believe, in his premise. The burden of showing the facts which would warrant the exclusion of the testimony was, of course, upon the petitioner. The testimony was relevant and, unless it violated the privilege, was competent. All that was presented to the trial judge were the bare facts that Buckley was retained to

[4] This decision is criticized in the *Vogelstein* decision, *supra*, and by Wigmore, who has collected the authorities dealing generally with disclosure of the identity of the client. (See Wigmore on Evidence, 3d ed., vol. VIII, sec. 2313, pp. 607–610.)

represent both the petitioner and Barbara. Whether it did or not, there was no showing that the retention of Buckley to represent Barbara was in any way related to petitioner's retention of Buckley to represent himself. We do not know, as the majority points out (R. 367) for what purpose, even, petitioner retained Buckley to represent himself. For aught that appears, petitioner may have retained Buckley to represent Barbara to secure her release from the police in order that she could resume her activity as a prostitute, as the evidence shows she did.[5] Or there may have been other factors wholly disconnected with petitioner's retention of Buckley as his attorney which motivated petitioner's retention of Buckley to represent Barbara. As there is no basis, upon the showing made in this record, for the premise upon which the dissenting judge builds his argument that petitioner's direction to Buckley to represent Barbara was a privileged communication, the trial court, we submit, did not commit error in permitting Buckley to disclose the direction.

Moreover, the dissenting judge attaches to the testimony a weight which we do not think it has when the evidence is viewed as a whole. It is difficult to reconcile his conception of the effect of the testimony with his compunction in voting to reverse because of the strength of the evidence of

[5] As has been indicated (*supra*, p. 6), the evidence discloses that she was arrested in Washington a little over a month later upon another charge of prostitution.

the accused's guilt. The testimony was introduced undoubtedly to show the close relationship existing between petitioner and Barbara but, as is apparent from the evidence summarized in the Statement, that as well as the other factors which so strongly fastened guilt upon petitioner, were abundantly established by evidence unexceptionable in character. The testimony did not, we submit, result in prejudicial error, even if it be assumed that it should not have been admitted.

3. Petitioner asserts (Pet. 5, 6) that his admission to an F. B. I. agent prior to his arraignment that he had registered at a hotel in Washington with Barbara was admitted in evidence in violation of the rule laid down in *McNabb* v. *United States,* 318 U. S. 332, but he does not argue this point or rely upon it as a ground for certiorari (Pet. 17). There is clearly no merit in the contention. The record reveals neither inexcusable detention for the purpose of illegally extracting evidence from the accused nor the successful extraction of any inculpatory statements by continuous questioning for many hours under psychological pressure.

The facts related by the F. B. I. agent on preliminary examination out of the presence of the jury show (R. 254–266): Arraignment was had within five hours after the agent had requested petitioner to accompany him to the F. B. I. office for questioning. That delay was occasioned by the absence of the Assistant United States At-

torney from his office and the necessity of awaiting the arrival of petitioner's attorney and the calling of the case by the United States Commissioner. In the interim petitioner had been advised that he was not required to answer any questions and he replied (R. 262) he "wouldn't answer unless he wanted to." "Most of the time he [petitioner] was telling about picking horses, how it was done. We weren't asking about violations at that time. We asked some questions and he would answer, and some he would not, and then he talked about gambling schemes. It was not a continuous question[ing] about any white slave violation" (R. 264). Petitioner's oral statement which was brought out at the trial was made after petitioner had talked with his attorney on the telephone and was awaiting his arrival at the United States Commissioner's office. The case is clearly outside of the *McNabb* case as elucidated in the later decision in *United States* v. *Mitchell,* 322 U. S. 65.

4. The final contention of petitioner, likewise unargued and not relied upon as a certiorari ground (Pet. 17), is that the trial judge abused his discretion in refusing to call Barbara as a court witness when both sides failed to do so (Pet. 4, 5). Clearly, as the court below held (R. 367), "The judge was not obliged to call the woman, whom neither the prosecution nor the accused put on the stand. She was equally available to the defense; and if they called her, they would not

have been in any way concluded by what she said, though, of course, it would have been extremely damaging if she proved hostile. True, they could not impeach her credibility once they had called her, but there is no reason to suppose that they could not find out what she would say. The judge might indeed have called her to the stand, had he thought best; but the notion that he must so far have taken a hand in the trial is wholly untenable."

CONCLUSION

The case was properly decided below, and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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